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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EAST CHICAGO REHABILITATION CENTER, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented for Review

1. Whether a walkout by unionized employees at a health care facility is protected despite the failure to give the ten-day strike notice expressly required by Sections 8(d) and (g) of the National Labor Relations Act [29 U. S. C. § 158(d) and (g)].

2. Whether a wildcat strike by unionized employees in support of separate bargaining demands is unprotected and in derogation of their union's status as exclusive bargaining representative pursuant to Section 9(a) of the National Labor Relations Act [29 U. S. C. § 159(a)].

3. Whether the employees' conduct in walking out of a skilled health care facility without any advance notice, leaving seriously ill patients, was so callous and indefensible that the employees forfeited any protection otherwise available under the National Labor Relations Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EAST CHICAGO REHABILITATION CENTER, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner East Chicago Rehabilitation Center, Inc. (hereinafter the "Center"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 1983.

Opinions Below

The opinion of the Court of Appeals (4a[1]-38a) is reported at 710 F. 2d 397.[2] The decision and order of the National Labor Relations Board (39a-62a) is reported at 259 NLRB 996 (1982).

Jurisdiction

The opinion of the Court of Appeals for the Seventh Circuit (4a-38a), enforcing the decision of the National Labor Relations Board, issued on June 27, 1983. The Court entered judgment (3a) on June 27, 1983. The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on August 24, 1983 (2a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et. seq.* (the "Act") are set forth in the Appendix (82a-83a).

Statement of the Case

East Chicago Rehabilitation Center, Inc., is a skilled nursing care facility which provides round-the-clock intensive nursing services to approximately 116 patients. (4a) The

[1] Reference to Petitioner's Appendix will be denoted as "__a".

[2] This case was decided by a divided panel of the Court with Circuit Judge Coffey writing a lengthy and vigorous dissent (17a-38a). Quotes taken from the dissent, shall be denoted hereinafter as "Dissent at ____a".

majority of its patients are "unable to take care of themselves," because they are either nonambulatory, blind, or require extended nursing care services. Some cannot either feed or turn themselves over in bed, and have "to be fed with tubes inserted through their noses and throats." (Dissent at 20a).

The instant case arose on June 15, 1979, when a group of first-shift employees refused to begin work after receiving a memorandum advising them of a change in the Center's lunch policy, effective the following week. A group of approximately 10 to 20 employees gathered in the hallway outside the Administrator's office and demanded a meeting. Reluctantly, the Administrator agreed to meet with employees in the lunchroom and explain the reason for the change in policy. In this meeting employees voiced general objections to the policy, as well as other concerns which they had. One employee asked that the effective date of the policy be postponed, and the Administrator agreed to attempt to have it delayed. (50a).

Not satisfied with the results of the meeting, 17 employees walked off their jobs and abandoned their patients without any advance notice or warning to the Center. (5a). All 17 of the employees who walked out were represented by the Retail Clerks Union Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, (hereinafter "the Union"),[3] which had been certified as their exclusive collective bargaining representative, six months prior to the walkout. (5a). At the time of the walk-out, the Center and the Union were close to concluding their negotiations for a collective bargaining agreement covering these employees, and had specifically discussed the subject matter of the change in the Center's lunch policy. (47a).

The majority of the 17 employees who walked out were nurse's aides and were responsible for providing essential

[3] The Union was the Charging Party in the original proceedings before the National Labor Relations Board; it has not sought to intervene in these proceedings.

nursing care services to the Center's patients. Their responsibilities included "feeding the patients, including those who received nutrition through tubes, transferring paralyzed patients, assisting . . . incontinent patients and in general making [patients] as comfortable as possible under the most trying circumstances." (Dissent at 21a).

As a result of the walkout, the usual first shift nursing staff of 19 was reduced to six. (Dissent at 21a). Those six employees along with untrained personnel from other departments, attempted to provide essential nursing care services to all 116 patients. As the Administrative Law Judge found, despite the efforts of these remaining employees the "wildcat" strike and the resulting reduction in the nursing staff "substantial[ly] disrupt[ed] the normal operations of the facility and creat[ed] serious patient care problems." (69a).

Because of the serious disruption in patient care caused by these employees' precipitious conduct in walking out and abandoning patients, and because of the lack of any substantive assurances that such callous conduct would not be repeated, the Center suspended and subsequently discharged the 17 employees involved. Although admitting that it is a "close case" and that "the Board might well have gone the other way," the majority below enforced the Board's order holding that the "wildcat" walkout was protected concerted activity. (17a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents An Issue of Critical Importance In The Administration of the National Labor Relations Act With Respect To Health Care Institutions.

The first issue presented in this case is whether there must be compliance with the ten days advance notice, as required by Section 8(g) of the Act, before a group of unionized employees can engage in a concerted work stoppage at a health care

institution. The decision below, which answered this question in the negative, results in a negation of the Congressional interest in enacting Section 8(g) and presents a dangerous peril to the continued delivery of critical health care services in this country.

Circuit Judge Coffey correctly stated in his dissent that the majority's decision—which found the sudden and precipitous walk-out protected by the Act—was one which:

> "... eviscerates and casts aside Congress' goal and specific intent in enacting Section 8(g)'s 10-day notice provision—to prevent sudden interruption in care to seriously ill patients."

Dissent at 29a.

Congress, in enacting the Health Care Amendments of 1974 to National Labor Relations Act[4] performed a careful balancing of the rights of health care employees to engage in collective bargaining and the rights of patients to receive continuous delivery of critical health care services. A product of this balancing was the enactment of Section 8(g) of the Act (82a-83a) which requires ten days advance notice by a labor organization before there can be a concerted refusal to work at a health care facility. In that manner employees obtain the right to engage in protected concerted activity, while patients are protected from the sudden cessation of their vital health care services. However, the decision below now presents an unduly restrictive reading of this provision, by requiring this advance notice *only* when a union calls or sponsors the strike, and thus represents "a dangerous precedent for the future." Dissent at 29a.

> "Based on the majority's decision, health care employees may now abandon their jobs in nursing homes, hospitals, emergency rooms, psychiatric

[4] These Amendments brought nonprofit hospitals under the jurisdiction of the Act, and established special rules governing the conduct of labor relations in the entire health care industry.

> institutions or intensive or intermediate care units and leave patients without care, without so much as a moment's notice, over almost any dispute with their employer." (Dissent at 29a).

This restrictive construction of section 8(g) directly contravenes the Congressional spirit behind this enactment, as evidenced in the Congressional debates by Senator Taft (one of the sponsors of this legislation):

> "Clearly employees acting without a labor organization or in derogation of a representative would have no greater rights or fewer obligations, for example, under 8(g) than those of a labor organization. *It would not be protected activity for employees acting without a labor organization to engage in a work stoppage or picket without giving the required notice.*" (120 Cong. Rec. S6941) (daily ed. May 4, 1974).[5]

Simply stated, these employees had a union, which, if properly advised, could have given the prerequisite Section 8(g) notice. The fact that the employees did not bring their dispute to their union does not alter the fact that the formal organization which existed was statutorily obliged to give this

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[5] Indeed, Senator Taft's interpretation of the protection to the public afforded by this section is confirmed by Representative Ashbrook's May 30, 1974 remarks. Representative Ashbrook, Legislative History of the Coverage of Non-profit Hospitals Under the National Labor Relations Act, 1974 Subcommittee on Labor of the Committee on Labor and Public Welfare, 93 Cong. 2d Sess. (Committee Print), p. 291.

> "The mandated mediation and the 10-day strike notice provide protection to the public, involve the mediation services to help resolve disputes, and give the hospital *ample warning* should the dispute fail to be resolved. *If the union or employees fail to observe the notice provisions, including the 10-day strike notice, they lose their status as employees. In other words, they can be dismissed for striking without giving the public the protection the bill provides.*" (Emphasis added).

notice *before* employees could engage in a protected strike. Clearly, it is appropriate to impose upon employees the consequences of their failure to give notice, when it is precisely their conduct in ignoring the union's status as their collective bargaining representative which caused that failure to occur. Moreover, this conclusion is supported by an analysis of the relationship between Section 8(d) and Section 8(g) of the Act. While Section 8(g) prohibits strikes without notice, it is Section 8(d) which enforces that prohibition. Significantly, Section 8(d) does not impose a penalty on the union for failing to give notice (e.g., a fine or a loss of certification status), but on *individual employees* who improperly strike during this legally mandated critical ten day period. Accordingly, it is both proper and consistent with Congressional intent to require unionized employees to first have their union give the ten day notice before striking.

Even assuming *arguendo* that Section 8(g) is only operative if a labor organization calls or sponsors a strike, the facts of this case mandate a finding that the actions of this ad hoc group of employees still violates this provision. It is submitted that a group of 17 employees that first demands a meeting with their employer, then presents the employer with their bargaining demands, and ultimately strikes in support of those demands clearly meets the board definition of "labor organization" set forth in section 2(5) of the Act. (82a). Having met that definition, this ad hoc group is manifestly required to give the 10 day notice before ceasing the delivery of their vital services to patients. The decision below, in finding those employees not to be a "labor organization," clearly misconstrued Section 2(5) and ignored relevant precedent.

This Court has recognized that the requirement contained in Section 2(5) of "dealing with employers" is broader than the concept of "bargaining" and that a group need not engage in what is normally thought of as formal collective bargaining to meet the definition of labor organization, *NLRB* v. *Cabot*

Carbon Co., 360 U. S. 203, 213 (1958). Indeed, in many prior decisions of the NLRB and Courts of Appeal, groups sharing characteristics similar to the group in issue herein were found to meet the statutory definition of labor organization.[6]

While the decision below recognizes that there is "no requirement of formality," it would exclude these 17 employees from the definition of "labor organization" on the basis that their act of joining together was "spontaneous" and "had neither organization nor purpose." (14a). However, contrary to this rationale, the fact that the initial gathering together of employees occurred spontaneously or that the group decision was not formally adopted does not negate the conclusion that an "organization" did exist. Indeed, an ad hoc group, informally brought together, without any by-laws or formal structure is sufficient where that group has the necessary prerequisite purpose. *See NLRB* v. *Sweetwater Hosp. Ass'n*, 604 F.2d 454, (6th Cir. 1979) at 457, n.5. — "The complete absence of by-laws or a formal structure is irrelevant." As the dissent more

[6] See *NLRB* v. *Kennametal, Inc.*, 182 F. 2d 817 (3d Cir. 1950), enforcing 80 NLRB 1481, finding that an "ad hoc" group which informally gathered together to present their grievance clearly fell within the broad definition of "labor organization"; *Pacemaker Corp.* v. *NLRB*, 260 F. 2d 880 (7th Cir. 1958) a "loosely" formed committee, without formal organization, by-laws, officers or dues constituted a labor organization; *S&W Motor Lines, Inc.*, 236 NLRB 938, 942 (1978), where the Board found an ad hoc group of employees to be a labor organization where the group met with the Employer and was "... loosely formed ... for however brief a time ..."; *National Packing Co.* v. *NLRB*, 377 F. 2d 800, 803 (10th Cir. 1967), where "labor organization" status was found when 17 employees walked off their jobs, even though these employees "did not have the organic structure of a typical labor union." See also *Rugcrafters of Puerto Rico, Inc.*, 107 NLRB 256 (1953), where a group of employees, who spontaneously refused to start work and punch their time cards in protest of their employer's change in payroll procedures, were deemed to meet the statutory definition of labor organization.

accurately notes, "the 17 employees *as of the time the walkout occurred* comprised an 'organization' since they had already held two meetings, one in the hallway . . . and the other in the Center's lunch room, before reaching a collective decision to walk off." (Emphasis added.)[7] Dissent at 27a.

Accordingly, the *ad hoc* group involved in this case clearly should be found to meet this broad definition set forth in section 2(5) and, as a result, have been bound to give the 10 days advance notice before engaging in their work stoppage. Such a holding would manifestly further the Congressional purpose of preventing sudden and precipitious disruptions to the delivery of health care services.

In summary, the decision below incorrectly interprets Section 8(g) of the Act and ignores the Congressional mandate underlying the enactment of that provision by allowing an ad hoc group of 17 employees to engage in a sudden and unannounced strike at a skilled health care facility. Clearly, Section 8(g) requires, under the circumstances in this case, that this ad hoc group either: (1) have its certified collective bargaining representative (i.e., the union) give the required advance notice or (2) directly give such advance notice themselves before engaging in a walkout. To hold otherwise, as the Court below does, renders nugatory the Congressional purpose in enacting Section 8(g). Because the decision below will have a tremendous impact on the continued delivery of health care services in this country, the instant case warrants resolution by this Court.

2. The Decision Below is in Conflict with Prior Court Decisions Concerning the Exclusive Status of Collective Bargaining Representatives and the Lack of Statutory Protection for "Wildcat" Strikes.

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[7] Unlike *NLRB* v. *Long Beach Youth Center, Inc.*, 591 F. 2d 1276 (9th Cir. 1979), relied upon by the majority, where employees did not hold any "organizational" meetings until *after* the walkout, employees here held two meetings before collectively deciding to walk out in support of their demands. *See* Dissent at 28a.

Review by this Court is additionally warranted because the holding below undermines a cardinal principle of labor law regarding the exclusive status of collective bargaining representatives, and is in conflict with principles enunciated by this Court in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U. S. 50 (1975), as well as a long line of decisions following *NLRB* v. *Draper Corporation*, 145 F. 2d 199 (4th Cir. 1944). See *Food Fair Stores, Inc.* v. *NLRB*, 491 F.2d 388 (3d Cir. 1974); *NLRB* v. *Sunbeam Lighting Company*, 318 F.2d 661 (7th Cir. 1963); *Harnischfeger Corp.* v. *NLRB*, 207 F.2d 575 (7th Cir. 1953); and *NLRB* v. *Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969).[8] If allowed to stand the decision below would render meaningless the premise underlying national labor policy that the "certification" of a collective bargaining representative "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Emporium Capwell Co.* v. *Western Addition Community Org., supra* at 63.

As Circuit Judge Co[illegible]oted below, and as this Court has firmly recognized, the right to collective economic action does not extend to independent conduct taken by a minority group of employees.

> *"The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.*
>
> * * *
>
> When the union was selected by the employees and recognized by the company as bargaining agent, it was understood and agreed on all sides that bargaining with respect to wages, hours and conditions of work would be carried on between the union and the company in accordance with the

[8] Not all the Circuit Courts of Appeal have chosen to follow *Draper*. Cf. cases cited by majority opinion below. (10a).

> above quoted statutory provision, that the employees would acquiesce in action taken by the union and that they would not undertake independent action with respect to the matters they had committed to it as their authorized agency. Not only did the company agree to bargain only with the union, but the employees agreed to bargain only through the union. Those who engaged in the 'wildcat' strike violated this agreement.
>
> . . . *No surer way could be found to bring collective bargaining into general disrepute than to hold that 'wildcat' strikes are protected by the collective bargaining statute."*

Dissent at 32a, quoting from *NLRB* v. *Draper Corporation, supra.*

Thus, where employees choose to be represented by a union, they concommitantly lose the right to act independently of their union. Just as the employer is obligated to deal only with the majority's chosen representative, so are employees obligated to act only through their authorized representative. *Emporium Capwell Co.* v. *Western Addition Community Org., supra; NLRB* v. *Sunbeam Lighting Company, Inc., supra; NLRB* v. *Draper Corporation, supra.*

While the Court below attempted to distinguish the instant case from *Emporium Capwell* on the basis that here, employees were not "asserting a right to bargain collectively in the union's place," that distinction necessarily fails. For whether employees attempt to replace their union in bargaining, or simply decide to bargain separately and independently of their union, the result is clearly inconsistent with the principles of exclusive representation. It in effect compels an employer to bargain on two fronts, one with the union and one with employees, and to satisfy each independently of the other if it wishes to avoid disruptions in its operations. That result not only makes a mockery of the principles of *exclusive* representation estab-

lished by the Act but is precisely the type of precipitate conduct which this Court found to be outside the protection of the Act in *Emporium Capwell.*

In addition, notwithstanding the court's attempt below to distinguish *Emporium Capwell* from the present case, it is clear that the pertinent facts of the two cases are almost identical.[9] In both cases, employees were represented by a union which was actively engaged in attempting to resolve employee grievances through the normal negotiation process. Similarly, in both cases employees took action which was separate and apart from the action being taken by their unions in a misguided attempt to either resolve their grievances independently or to speed up the process of resolution. Moreover, in both cases the conduct taken by the employees could not have been taken by their unions. In *Emporium Capwell,* the union was precluded from picketing on the basis of a provision in the parties' contract. In the present case, the union could not have called a strike because of the statutory requirement that it give ten days' written notice of an intention to strike. 29 U. S. C. § 158(g). Because employees in the present case like the employees in *Emporium Capwell* went outside the collective bargaining relationship and engaged in acts of separate bargaining which

[9] In *Emporium Capwell* a group of employees filed grievances with their union, charging that their employer practiced racial discrimination. Upon investigation, the union determined that those grievances were meritorious and proceeded to process them through the normal grievance-arbitration channels established in the parties' contract. Not satisfied with the union's method of handling their grievances, however, several employees independently decided to set up their own picket line outside of the employer's facility to protest their employer's discriminatory policies. The employees were discharged and their discharges were upheld on the basis that their conduct in setting up their own picket line constituted separate bargaining in derogation of the union's status as exclusive representative. Significantly, although the employees' underlying position was not inconsistent with what the union was attempting to accomplish, the employees' method of voicing their concerns outside of the collective bargaining relationship rendered their conduct unprotected.

were not authorized by their union and which directly interfered with ongoing bona fide collective bargaining activity, their conduct is not entitled to protection under Section 7 of the Act.

In conclusion, the court's decision below conflicts with the premise of exclusivity recognized by this Court in *Emporium Capwell.* This conflict, as well as the conflict among the circuits on this most important issue, warrants review by this Court.

3. The Decision Below Improperly Deferred to the Board's Judgment That the Walkout Did Not Endanger Patients' Health and Welfare.

Contrary to the Administrative Law Judge's finding that the walkout substantially disrupted normal operations and created substantial patient care problems (69a), the majority below summarily concluded that the walkout caused no more than mere "inconvenience". While the Board in a footnote reversed the Administrative Law Judge's specific finding in that regard, (40a) its opinion is not entitled to deference. Excessive deference to the Board in this case is not warranted since "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeals." *Beth Israel Hospital* v. *NLRB,* 437 U. S. 483, 507 (1978). Dissent at 19a.

As Circuit Judge Coffey notes, the decision below ignored "the suffering, severe emotional strain and potential danger the patients were subjected to as a result of the wildcat strike." Dissent at 21a. Moreover, an examination of the record discloses that the "disruption in patient care was far more serious than "mere inconvenience" and that "the most serious disruptions in patient care occurred entirely during the period of the walkout, before the wildcat strikers offered to return to their jobs at the direction of their union." Dissent at 24a.

This Court has recently acknowledged the need for a statement in this area by granting review in *Woodkraft Division, Georgia Kraft Co.* v. *NLRB*, 52 U.S.L.W. 3380 (November 15, 1983), *reviewing* 696 F.2d 931 (11th Cir. 1983), a case involving the scope of the Section 7 protection afforded to striker misconduct. Similarly, the instant case presents a situation which warrants the reexamination by this Court of the proper limits of protection accorded to health care employees who engage in conduct which adversely affects and endangers their patients' health and general well-being. The instant case is in an appropriate posture to provide much needed guidance in this area.

CONCLUSION

For all the foregoing reasons, the Center respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1983

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. EDWARD R. NEAHER, Senior District Judge*

EAST CHICAGO REHABILITATION CENTER, INC
Petitioner,

No. 82-1129 vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board.

ORDER

On July 11, 1983, petitioner East Chicago Rehabilitation Center, Inc., filed a petition for rehearing with suggestion of rehearing *en banc.* A majority of the judges on the original panel have voted to deny the petition, and a majority of the active judges have voted to deny the suggestion for rehearing *en banc.*** The petition is therefore DENIED.

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* Of the Eastern District of New York, sitting by designation.

** Circuit Judges Wilbur F. Pell, Jr., and John L. Coffey voted to grant a rehearing *en banc.*

Opinion by Judge Posner
Judge Coffey dissenting.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1983

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. EDWARD R. NEAHER, Senior District Judge*

EAST CHICAGO REHABILITATION CENTER, INC.,
Petitioner,

No. 82-1129 *vs.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board.

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that enforcement of the order of the National Labor Relations Board in this matter be, and the same is hereby, GRANTED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable Edward R. Neaher of the Eastern District of New York, sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 82-1129
EAST CHICAGO REHABILITATION CENTER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of an Order of the
National Labor Relations Board.

ARGUED JANUARY 3, 1983—DECIDED JUNE 27, 1983

Before POSNER and COFFEY, *Circuit Judges,* and NEAHER, *Senior District Judge.**

POSNER, *Circuit Judge.* This petition to set aside the Labor Board's order finding that a nursing home committed an unfair labor practice in firing striking employees requires us to consider the rights of health-care employees to engage in concerted activity for mutual aid or protection in light of sections 7, 8(g), and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 157, 158(g), 159(a).

The East Chicago Rehabilitation Center provides round-the-clock intensive nursing care to some 116 patients. In

* Honorable Edward R. Neaher of the Eastern District of New York, sitting by designation.

December 1978, after a representation election, a local of the retail clerks union was certified as the collective bargaining representative of the Center's service and maintenance employees. In February 1979 it began negotiating with the Center for a collective bargaining agreement. During the negotiating session on June 11, Henderson, a part-owner of the Center and one of its negotiators, happened to mention that the Center permitted its employees to leave the premises during their paid lunch break. A consultant to the Center who was participating in the negotiation interjected that the Center would be liable under workmen's compensation law for any injury an employee sustained off the premises during a paid break, whereupon Henderson stated that the Center would have to stop letting its employees leave the premises for lunch. The union negotiators objected to such a change, especially when the parties were close to agreement on a contract. But Henderson was adamant, and a few days later, without notice to the union, the Center circulated a memorandum to its employees informing them that effective June 18 all employees would have to remain on the premises during lunch and that failure to comply with this directive would result in immediate termination.

The employees on the first shift (7:00 a.m. to 3:00 p.m.) received the memorandum at the start of the shift on June 15. They immediately gathered in small groups in the halls, discussing the change. Management got wind that they were upset and held two meetings with them that morning to explain the reason for the change of policy. After the second meeting ended, 17 of the employees decided to walk out in protest against the change. The union found out about the walkout, and its representatives immediately got in touch with the striking workers (who were either still in the Center or just outside), told them they should not have walked out and that the union would not sanction their strike, and asked them whether they were willing to go back to work. They said they were and the union immediately conveyed this message to the Center's management. But the Center refused to reinstate

them, even temporarily, and instead suspended them till such time as its board of directors could meet to decide whether to fire them; and they went home. Although the exact chronology of the morning is unclear, it appears that two hours elapsed between the walkout by the 17 employees and the decision to suspend them.

The negotiations for a collective bargaining contract concluded successfully on June 18. The contract converted the lunch hour into unpaid time, so that the employees could leave the premises without exposing the Center to liability. In lieu of the paid lunch break they received two paid coffee breaks (described by the administrative law judge as two 20-minute lunch breaks, but he must have meant coffee breaks).

On June 20 the Center fired the 17 employees who had walked out on June 15. The Board then brought unfair labor practice proceedings against the Center, and after a hearing concluded that the Center had violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by firing the 17 workers—their strike being, in the Board's view, activity protected by section 7. The Board therefore ordered the workers reinstated with back pay.

A strike to protest a change in working conditions is within section 7's broad definition of protected activity. But the Center argues that the strike in this case was taken out of section 7 by other provisions of the Act, notably sections 9(a) and 8(g), and by the judge-made rule that denies the protections of section 7 to abnormally destructive strikes.

Section 9(a) makes the "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." Thus, if the 17 workers had been striking

to enforce a demand that the company bargain with them, rather than with the union, over where they could eat lunch, the strike would not have been protected by the provision in section 7 that "employees shall have the right . . . to bargain collectively through representatives of their own choosing . . . ." But that is not what the workers were doing. Their spontaneous, unorganized walkout in protest against the company's unilateral change in the conditions of their employment was not an effort to butt their way into the bargaining process but an instance of what section 7 protects under the rubric of "other concerted activities for the purpose of . . . mutual aid or protection."

Thus this case is not like *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975), where a group of employees, dissatisfied with the union's representation, expressed "their desire to deal directly with 'the top management' of the Company over minority employment conditions, announced their intention to picket and institute a boycott of the store" to enforce this demand, and "were discharged for attempting to bargain with the Company . . . ." *Id.* at 55, 60. It is not like *Harnischfeger Corp. v. NLRB,* 207 F.2d 575, 578 (7th Cir. 1953), where "a comparatively small number of discontented employees undertook by a work stoppage or strike movement to take charge of and direct the actions of their chosen bargaining representative in negotiation with their employer as to the terms of employment." The Center's workers expressed no dissatisfaction with the union and no desire to take negotiations into their own hands. They merely wanted to show how angered they were by the unilateral change in the lunch rules. It is not like *Food Fairs Stores, Inc. v. NLRB,* 491 F.2d 388, 394 (3d Cir. 1974), where the strike "was carried out against the wishes of the Union," violated the collective bargaining agreement, and "was in part to protest against certain substantive portions of the agreement concerning seniority to which the union had assented." The union here did not

assent to—it protested—the change in the lunch rules; the strikers were not even aware that the change was under discussion in the collective bargaining sessions between the union and the employer; and when told by the union to return to work the strikers immediately agreed. By demonstrating to the union the passions that had been aroused by the new lunch rule, the strike led the union to demand that the employer rescind the rule, and in effect he did, by converting the paid lunch hour to unpaid leave (with compensating concessions so that the workers were not worse off); and there is no evidence that in demanding rescission the union was merely yielding to pressure from a vocal minority and giving up alternative demands more important to the bargaining unit as a whole.

The fact that the union told the workers to go back to work does not prove that the strike undermined the union's performance of its collective bargaining function. The union *had* to repudiate the strike. Otherwise it might have been held to have ratified it, which would have made the strike an unprotected activity and thereby cost the strikers their jobs. Section 8(g) of the Act provides that "a labor organization before engaging in any strike . . . at any health care institution, shall, not less than ten days prior to such action, notify the institution in writing . . . ," which was not done here; and a strike unlawful under section 8(g) is not protected by section 7. See section 8(d), 29 U.S.C. § 158(d).

To hold as the petitioner would have us hold that all wildcat strikes (i.e., strikes not authorized by the strikers' collective bargaining representative) are unprotected, regardless of circumstances, might be an advance in the theory and practice of industrial relations—though one that can be attained at the level of the individual bargaining unit by writing a no-strike clause into the collective bargaining agreement. But it would not be good law. Although it has been said that "wildcat concerted activities are unprotected and render the participants susceptible to discharge," Gorman, Basic Text on Labor Law

311 (1976), the facts of the cases Professor Gorman relies on show that his generalization cannot be sustained. Most are cases where, as in *Harnischfeger* and *Food Fair Stores,* the wildcat strikers were trying to take over the collective bargaining function from the union. *NLRB v. Draper Corp.,* 145 F.2d 199 (4th Cir. 1944), the original anti-wildcat case, was such a case. The day before the union was to meet with the company to negotiate a collective bargaining agreement, the company's representative got sick, and the meeting was cancelled by mutual agreement. A group of employees 'thought that his illness was feigned as an excuse for delay and became angry and resentful," and they went out on strike because "they considered that the company was 'stalling' and . . . they wanted 'action' and would get it." *id.* at 201. They were striking as much against the union as against the employer. Thus, as we said in *NLRB v. Kearney & Trecker Corp.,* 237 F.2d 416, 420 (7th Cir. 1956), *Draper* and *Harnischfeger* stand for the proposition that "when the minority group attempts to control the actions of the majority, its action is not protected," and that is not this case. *NLRB v. Sunbeam Lighting Co.,* 318 F.2d 661, 662 (7th Cir. 1963), and *Lee A. Consaul Co. v. NLRB,* 469 F.2d 84, 85 (9th Cir. 1972) (per curiam) ("a five day wildcat strike, viewed as such by both the employers and the union"), are distinguishable on the same basis, while *NLRB v. Tanner Motor Livery, Ltd.,* 419 F.2d 216 (9th Cir. 1969), another in the *Draper* line, is like *Emporium Capwell.* The best case for the petitioner is *NLRB v. Shop Rite Foods, Inc.,* 430 F.2d 786 (5th Cir. 1970), but the court in *Shop Rite* stated, "We do not hold that there cannot be circumstances in which an employee or a minority group of employees may engage, without reference of the matter to union processes, in action which is protected under Section 7 though there is an agreement in force or in the process of negotiation." *Id.* at 791. The strike was planned, and lasted at least 18 days. The brief spontaneous walkout in this case is within the area of wildcat activity the lawfulness of which was left open in *Shop Rite.*

The controlling cases here are none that we have discussed. They are, rather, *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998-99 (2d Cir. 1976), where "there [was] no evidence that the Palm Sunday strikers were at odds with or attempting to by-pass their union," through the court also noted that the strike may actually have been authorized by the union, *id.* at 999; and our own circuit's decision in *Jones & McKnight Inc. v. NLRB*, 445 F.2d 97, 105 (7th Cir. 1971), which points out that "the fact that none of the strike activity was sanctioned by the Union is of no import. . . . By authorizing a bargaining agent to represent them, the employees cannot be said to have waived all rights to protect themselves against an employer's unlawful actions, since their individual action in such circumstances is not an attempt to undermine their representative's position, but to protest the employer's circumvention of the policies of the [National Labor Relations] Act." The company's action in this case is unilaterally—one might even say, provocatively—changing the conditions of employment while the union was bargaining collectively—indeed, only three days before the contract was signed—may likewise have been a "circumvention of the policies of the Act," although no section 8(a)(5) charge was filed. *Western Contracting Corp. v. NLRB*, 322 F.2d 893, 899 (10th Cir. 1963) (alternative holding), is like *Jones & McKnight*, while another decision of this circuit, *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 326-27 (7th Cir. 1976), holds, consistently with all the precedents, that not all wildcat concerted activity is outside the protection of section 7.

Section 7 is broadly worded—deliberately so. See, e.g., *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-68 (1978); *NLRB v. Browning-Ferris Industries*, 700 F.2d 385, 386-88 (7th Cir. 1983). Although section 9(a) qualifies section 7, it qualifies the part of section 7 that gives workers the right to bargain collectively. It does not—not explicitly anyway—qualify their section 7 right to engage in other concerted activities for mutual

aid or protection. Unless, therefore, a wildcat strike is called for the purpose of asserting a right to bargain collectively in the union's place or is likely, regardless of its purpose, to impair the union's performance as exclusive bargaining representative, section 9(a) does not put the strikers beyond the pale of section 7. That is the natural reading of sections 7 and 9(a), the reading most consistent with section 13, 29 U.S.C. § 163, which provides that "nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ," the reading by the Board, and the reading that makes the most sense out of the case law.

Still, there may be enough play in the joints to allow new law to be made in this area. If the Board were to hold that wildcat strikes are per se in derogation of the union's role as exclusive bargaining representative—pointing out, as it could, that any concerted activity is an implicit demand for company action and is therefore inherently inconsistent with the union's exclusive role—we would give its views respectful attention. But the Board rather than the courts should be the innovator. It can reconcile the policies of section 7 with those of section 9(a), can harmonize the Act's discordant themes of the rights of employees as individuals and the rights of unions as collectivities, better than we—who maybe cannot do it at all. We have no guides to judgment in this area. Although the concept of administrative agency expertise has a large fictive component, there is no denying that the Board knows more than we do about the impact of wildcat strikes on unions and employers; and we are not much worried that the Board's all too frequent bias toward unions will prejudice it in this area against employers, since a wildcat strike will often (the petitioner would say always) hurt the union as well as the employer. Therefore, if the Board chooses to distinguish between wildcat strikes that undermine the union's position as exclusive collective bargaining representative and ones that do not, as it did in this case and

has done in others, see, e.g., *Sunbeam Lighting Co.*, 136 N.L.R.B. 1248, 1253-55 (1962), enforcement denied, 318 F.2d 661 (7th Cir. 1963); *R.C. Can Co.*, 140 N.L.R.B. 588, 595-96 (1963), enforced, 328 F.2d 974 (5th Cir. 1964), we must let it.

Of course, even if section 9(a) does not exclude the striking workers from the protection of section 7, section 8(g)—the 10-day notice provision mentioned earlier—may. But that section applies only to strikes by "labor organization[s]." The petitioner argues that the purpose of the 10-day notice requirement would be defeated if workers could get around it simply by striking without their union's authorization. The argument has merit but is addressed to the wrong body. Even a judge who was not a literalist in statutory interpretation, and who disregarded section 13 of the Act, and the pointed warning by Senator Harrison Williams, a sponsor of the 1974 Health Care Amendments, that "this legislation is the product of compromise, . . . and the Labor Board should use extreme caution not to read into this Act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof," 120 Cong. Rec. 22575 (1974), and the explicit and as we shall see restrictive definition of labor organization in section 2(5), 29 U.S.C. § 152(5), would be hardpressed to interpret section 8(g) as if the words "labor organization" did not appear. True, one of the sponsors of the bill that added this section to the Act, Senator Robert Taft, Jr., stated on the floor that "it would not be protected activity for employees acting without a labor organization to engage in a work stoppage . . . without giving the required notice," 120 Cong. Rec. 12945 (1974); but there is no indication that any other member of Congress agreed with his statement.

The statute is not irrational when read, as it is written ("a labor organization before engaging in any strike . . . shall . . ."), to limit the notice requirement to strikes called by organizations—which will usually mean, by unions. Such strikes, at

least if called without notice, generally are more costly than wildcat strikes. A union-authorized strike is apt to last longer, involve more workers, and command more support from other unions than a wildcat strike (though wildcat strikes, especially if protected by section 7, may be more frequent). This strike involved only one-third of the workers on only one of the employer's three shifts, lasted only two hours, and so far as appears was not part of a pattern of wildcat activity at the Center.

Every other decision has read section 8(g) to mean what it says: the notice requirement is applicable only if the strike is by a labor organization. See *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 514-15 (2d Cir. 1980); *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979); *NLRB v. Rock Hill Convalescent Center*, 585 F.2d 700, 701 (4th Cir. 1978). We consider these decisions authoritative in this case even though they involved strikes at nonunion facilities, and when a facility is unionized (as the Center is) it is difficult to distinguish between a truly unauthorized strike and "a wink and a nod" strike encouraged by the union to evade the requirement of advance notice. That is an issue in this case, as we shall see. But to rewrite section 8(g) so that it reads, "if a health-care facility is unionized any strike, whether or not called by a labor organization, must be preceded by 10 days' written notice," would exceed the permissible limits of judicial creativity, when nothing in the background of the statute indicates that we are licensed to take it other than at face value.

This assumes, it is true, that wildcat strikes were not considered per se unlawful in 1974, when section 8(g) was enacted; for if they had been, there would have been no occasion to require advance notice for wildcat strikes. But if we have interpreted the case law correctly, in 1974 as today wildcat strikes were not per se unprotected. And while the important thing is not what we think today but what Congress thought in 1974, the legislative history of the Health Care Amendments

contain, no suggestion that Congress thought that wildcat strikes were per se unprotected and only for that reason failed to extend the 10-day notice requirement to them expressly.

The petitioner makes two other arguments under section 8(g), and though the first is inconsistent with its section 9(a) argument that does not make it wrong, now that we have rejected that argument. The first argument is that the strike, far from being in derogation of the union's role as the exclusive collective bargaining representative, was authorized by the union and was therefore a walkout by a labor organization to which the 10-day notice requirement of section 8(g) applied by its terms. The principal evidence of union authorization is that one of the leaders of the walkout was a union steward. The Board could and did find this evidence overborne by a mass of direct evidence that the union did not authorize the strike and tried to stop it as soon as it found out about it.

The second argument is that the 17 striking workers comprised an informal labor organization. Section 2(5) of the Act, 29 U.S.C. § 152(5), defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." There is no requirement of formality—no requirement that the "labor organization" be recognizable as a union—but there must be an organization, such as the employee committee in *Pacemaker Corp. v. NLRB,* 260 F.2d 880, 883 (7th Cir. 1958), and one of its purposes must be bargaining with an employer. In *Long Beach Youth Center, Inc., supra,* 591 F.2d at 1278, there was purpose but no organization, and that was held not to be enough. In this case the 17 spontaneously striking workers had neither the organization nor the purpose, and they were therefore not a labor organization. If any concerted activity by workers—however spontaneous, ad hoc, and unstruc-

tured—were the activity of a "labor organization," section 8(g) would require advance notice of any walkout by two or more workers acting in concert, and the limitation that Congress appears to have intended when it required advance notice only of a strike by a labor organization would be undone.

The petitioner's final argument is that the walkout was unprotected because it endangered the health of the nursing home's patients. Section 7 has been interpreted not to protect concerted activity, whether incident to a strike or otherwise, to destroy property or endanger life or limb. See, e.g., *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955). But more must be shown than that the activity caused inconvenience. The whole purpose of a strike is to impose costs on the employer, in the hope of making him come to terms; and an effective strike, by preventing the employer from serving his customers, necessarily imposes costs on them as well: it forces them either to turn to other suppliers of the goods or services sold by the employer (thus denying them their first choice) or, as in this case, to do without for a time.

Thus the Board in this case had to decide whether the strike merely caused inconvenience to the Center's patients or whether it endangered them. See, e.g., *Montefiore Hospital & Medical Center, supra,* 621 F.2d at 516. The administrative law judge found that the strike had "creat[ed] serious patient care problems," but did not find any actual danger to health and concluded that the strike was protected activity. The Board found that "although some patient care schedules were not completely adhered to, there is no showing that the strike jeopardized any patient's safety or health," noting that "once the strikers offered to return to work they could not be held responsible for any subsequent interruption in normal patient servicing." Our job is to decide whether these findings are supported by substantial evidence on the record as a whole. The strongest evidence is that when management learned that the workers were willing to resume work immediately it refused

to take them back. Unless the Center wanted to be prosecuted for criminal neglect it would not have done this if there were danger to its patients. It did not have to suspend the strikers on the spot even to preserve its claim to have a right to fire them for engaging in unprotected activity, for without any prejudice to its being able to fire them later it could have reinstated them temporarily till it lined up replacements, provided only that it made its intentions clear when it reinstated them.

It must be, therefore, that the Center could operate safely for several days without the 17 striking workers (that, or its management was behaving recklessly); if so, then it could operate safely for a few hours without them. No doctors or nurses walked off—only nurse's aides, orderlies, and maintenance workers, and not all of the employees in these categories, either. Although there was delay in serving patients breakfast, giving them their medications, and changing their sheets—a hardship, obviously to incontinent patients, and there were some—and although the sudden disappearance of the customary staff cause anxiety to some patients, no one was put in danger or subjected to acute distress, nor were such consequences likely from so short and incomplete a walkout of nonprofessional workers. The fact that the strike caused a delay in removing the body of a patient who had died (there is of course no suggestion that this death was caused or hastened by the strike) adds to the unpleasantness of the episode, but the very emphasis the petitioner places on this fact highlights the difference between a nasty strike and a dangerous strike.

The judge-made exception to section 7 for intolerably destructive concerted activity is illustrated by *NLRB v. Reynolds & Manley Lumber Co.*, 212 F.2d 155, 158 (5th Cir. 1954), where a worker walked off the job and left boilers unattended, which "undoubtedly created a very dangerous situation and was a violation of positive instructions that it should never be done. He must have known, since he had worked for the company many years at different times, that in 1945 a fire had

broken out under similar conditions, resulting in a loss of some $200,000, and at that time the plant had to be shut down for some six months while the sawmill was rebuilt." The medical equivalent would be a nurse's walking out of an operating room in the middle of an operation. This would not be protected activity, nor would be the many less extreme examples that could be put involving danger to life or health, but even they would be remote from this case. Nurse's aides are not professionals and are not entrusted with critical responsibilities, and the walkout was of short duration. Although at some point the cumulative distress to helpless patients caused by a walkout of nurse's aides might cross the line that separates inconvenience from inhumanity, the evidence did not require the Board to find that it has been crossed in this case. Nevertheless this is a close case, and the Board might well have gone the other way.

A finding that concerted activity is protected by section 7 does not condemn the employer to inaction. Protected does not mean privileged. As pointed out in *NLRB v. Browning-Ferris Industries, supra,* 700 F.2d at 388-89, the employer may take all necessary steps to keep his business running smoothly—may hire permanent replacements and so on. But he cannot operate with a completely free hand as he tried to do here. It might be better for society if he could but we think Congress has decided otherwise, and we are bound however reluctantly by its decision.

The Board's order will be

ENFORCED.

COFFEY, *Circuit Judge,* dissenting. I am compelled to dissent as I cannot agree with the conclusion of the NLRB and the majority that, in participating in an unauthorized "wildcat" strike at a skilled nursing care facility, the 17 Rehabilitation Center employees were engaging in protected concerted activity. The majority's holding, concentrating solely on the interests of employees to the exclusion of the interests of the employer as

well as the public, makes a mockery of Congress' intent to strike a fair balance between the conflicting interests of employers and employees. The majority's holding is even more disturbing as it involves a "wildcat" strike in the health care field, where the health, welfare and safety of infirm and dying patients are directly threatened by sudden interruptions in physical and medical assistance. Like police and fire departments, health care facilities, whether they be hospitals, nursing homes or psychiatric care institutions, play a vital role in preserving our society's health and well-being and, therefore, the rights of patients and the public to receive uninterrupted services becomes critically important in cases dealing with "wildcat" strikes in the medical field. Judge Posner's cold and detached analysis treats this case as though we were considering a walkout occurring on an assembly line, in a steel mill or in a coal mine, where at most an interruption in production would result. Rather, I dissent as I believe it is important to emphasize that this walkout occurred in the health care field, where human lives are all too frequently hanging in the balance. Moreover, I would hold that the 17 employees who walked off their jobs constituted a "labor organization," and thus were required to give 10 days notice prior to any work stoppage or strike. Finally, I disagree with the majority's decision because, in holding that this "wildcat" strike was protected activity, the majority disregards an overwhelming weight of prior case law.

I.

It is axiomatic that Congress' goal in enacting the National Labor Relations Act was to strike a fair balance between the interests of employers and employees. As the Supreme Court has often stated:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and

> delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

NLRB v. Truckdrivers, 353 U.S. 87, 96 (1957). In this case, the majority had blindly accepted the NLRB's so-called "balance" by cavalierly stating that the NLRB "can reconcile the policies of section 7 with those of section 9(a), can harmonize the Act's discordant themes of the rights of employees as individuals and the rights of unions as collectivities, better than we—who maybe cannot do it at all."

I cannot join with the majority in affording excessive deference to the NLRB in this case since "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeals." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). Rather, we must bear in mind the District of Columbia Circuit's words in *Service Emp. Intern. U. v. NLRB*, 600 F.2d 930, 939 (D.C. Cir. 1979) regarding the proper role of the courts of appeals in reviewing the decisions of the NLRB:

> "We are not unmindful of the fact that there is only limited judicial review of [NLRB] findings but the Supreme Court in *Labor Board v. Brown* ... pointedly stated that the phrase 'limited judicial review' did *not* mean that the balance struck by the Board was immune from judicial examination and reversal in proper cases, and 'where, as here, the review is not a question of fact, but of judgment as to the proper balance to be struck between the conflicting interests, *the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.*' " (emphasis added).

By falling into judicial inertia, Judge Posner has in his reasoning in this case effectively rendered the NLRB "immune from judicial review" and has ignored the "undisputed right of employers to maintain discipline in their establishments." *Eas-*

tex, Inc. v. NLRB, 437 U.S. 556, 571 (1978). Courts must not abdicate their responsibility and become, in effect, merely rubber stamps for the decisions of the NLRB, particularly where the NLRB decision concerns "judgment as to the proper balance to be struck" in a fact situation involving the very well-being of the sick, weak, infirm and dying in a nursing home or hospital facility.

Furthermore, the excessive deference afforded by the majority to the NLRB is particularly injudicious since this case involves a "wildcat" strike in the health care field which, like police and fire departments, provides vital services, rather than in the usual industrial setting with which the NLRB is more accustomed and has accumulated a certain expertise. As the Supreme Court stated in *Beth Israel Hospital*, 437 U.S. at 508, *quoting NLRB v. Beth Israel Hospital*, 554 F.2d 477, 481 (1st Cir. 1977):

> "Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized."

Similarly, Justice Blackmun, in his concurrence in *Beth Israel Hospital*, eloquently described the unique characteristics of the health care field:

> "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."

Id. at 509.

Nevertheless, Judge Posner in this case glosses over the suffering, severe emotional strain and potential danger the patients were subjected to as a result of the wildcat strike. First, the majority summarily concludes that the wildcat strike of the 17 employees "merely caused inconvenience." However, an examination of the facts in the record discloses that the disruption in patient care was far more serious than "merely inconvenience." Of the 116 patients at the Rehabilitation Center, more than 58 were unable to care for themselves, being either paraplegics, hemiplegics, blind, incontinent and/or having to be fed with tubes inserted through their noses and throats. The duties of the nurse's aides who walked off their jobs consisted of feeding the patients, including those who received nutrition through tubes, transferring paralyzed patients, assisting those incontinent patients and in general making them all as comfortable as possible under the most trying circumstances. After the walkout of the 17 employees, the Center's usual on-duty nursing staff of 19 was reduced to only two nurse's aides and four nurses to perform these important duties for the 116 patients.

The majority further misconstrues the record by stating "no one was put in danger or subjected to acute distress, nor were such consequences likely from so short and incomplete a walkout of non-professional workers." Once again, the record paints a vastly different picture. For example, the Center Administrator described the effects of the walkout as follows:

"Q. What major problems, if any, did you observe?

"A. There was one patient that had expired.

"Q. Died?

"A. Yes. The body just laid there. I don't know when the body finally got out but it was just laying there.

"Q. What would have normally happened had there been a full work force?

"A. The body would have been dressed and prepared and the undertaker notified, the physician and undertaker notified and the body would have been removed.

"Q. Was this dead patient in a room by him or herself or in a room with somebody else?

A. I don't know.

"Q. Do you generally have two people to a room?

"A. Yes."

* * *

"There was a big lapse in patient care when the walkout happened and the patients didn't understand what was going on. The type of patient that we have are skill level and out of the three different types of levels of care residential, intermediary and skills, skills being the most critical of the three patients. Those are the type of patients that we service.

"Many of the patients can't feed themselves. They can't get up by themselves. When the employees walked off, we had patients that were not fed and they couldn't feed themselves. The food was sitting there but they couldn't feed themselves. The food was cold when they did get it. Patients were laying in urine and feces until we could get the supervisors together to go out there to the floor."

* * *

"A. [The patient's food] was taken to the floor but I found out later that the problem didn't just start when [the striking employees] requested the meeting but earlier when they first came to work. The work hadn't been done from that period on either. There was a very minimal amount of work done that particular day and so the work that should have been done, like patients being showered, patients weren't even showered and the stench was just all over the facility.

"Q. What difference does that make in terms of patients being showered? What problems were there?

"A. The patients developed bedsores, rashes and all types of problems. A lot of patients there, because of their physical condition, have a worse body order [sic] than what you would term as the normal person and, of course, you still have the people laying in feces and urine.

"Q. How many people were in that condition?

"A. There were many numbers, at least that I observed personally, maybe about 20, 25. They were just laying there until the supervisors could get to them or whoever could get to them."

Furthermore, Metta Stone, who as Nursing Supervisor in charge of the nurses aides was responsible for supervising the care of the Center's patients, testified that the day of the walkout was "the worst day of [her] life." Not surprisingly, the Administrative Law Judge, after hearing all of the witnesses, found that the "wildcat" strike, and the resulting reduction in on-duty nursing staff caused a *"substantial disruption in the normal operations of the facility and create[d] serious patient care problems."* The majority and the NLRB completely disregard this finding of the trier of fact (the ALJ) based on direct, positive testimony, in order that they might selectively analyze the record to reach their desired result. *See NLRB v. Cutting, Inc.*, 701 F.2d 659, 665 (7th Cir. 1983). Furthermore, the NLRB violated the Supreme Court's directive in *Beth Israel Hospital*, 437 U.S. at 508 that "the Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized," as it was in this case.

Despite the ALJ's finding that the walkout "create[d] serious patient care problems," and despite the overwhelming testimony that the walkout resulted in severe hardship and potential danger to the Rehabilitation Center's patients, the NLRB and the majority conclude that the patients experienced

only "mere inconvenience." However, I would hold that the patients were subjected to far more than "mere inconvenience" since the record shows that patients were not fed on time (certainly more than a "mere inconvenience" to patients receiving nutrition through tubes), and patients had to lie in their own excrement until supervisory personnel could attend to them, causing the development of bedsores and rashes. Nevertheless, Judge Posner concludes that the walkout resulted in "mere inconvenience," stating that "the strongest evidence is that when management learned that the workers were willing to resume work immediately it [the management] refused to take them back." This reasoning is specious for two reasons. First, because of the emergency created by the walkout, the Center management was forced to transfer supervisory and clerical personnel to patient care duties. When the striking employees finally offered to return to their jobs the fill-in supervisory and clerical employees had brought the situation under control, though the level of care was still well below that normally provided by the Center, since there were only two nurses aides and four nurses then on-duty, a ratio of approximately one nursing employee for every nineteen patients (not including the patient that died on that date). The record clearly demonstrates that the most serious disruptions in patient care occurred entirely during the period of the walkout, before the wildcat strikers offered to return to their jobs at the direction of their union.

More importantly, there is no reason why the Rehabilitation Center management should be required to allow the "wildcat" strikers to return to work. No employer should be required to employ workers who demonstrated such cold and callous disregard for sick and weak human beings entrusted to their care by abandoning seriously ill patients and walking off their job over something as insignificant as being required to eat lunch on the premises. What assurance does the Rehabilitation Center management have that the employees will not again

cavalierly walk off the job in the future any time they might disagree with their employer over some matter of trivial importance compared to plight of the sick and helpless patients? In refusing to reinstate the wildcat strikers, the Rehabilitation Center management was acting well within its right and, in fact its duty, to ensure that it had a dependable workforce to provide uninterrupted care for the seriously ill patients; hospitals and nursing homes are entitled to have a sympathetic, dedicated and concerned workforce. The striking workers did not leave an assembly line, a steel mill or a mine unattended—rather, they left sick and helpless human beings desperately in need of care. Each year this nation's health care facilities spend billions of dollars on sophisticated medical research and technology, which are useless if for any reason the health care personnel decide to stage a "wildcat" walkout and abandon their sick and dying patients. Nonetheless, Judge Posner today allows health care workers to abandon helpless patients without 10-days advance notice, in fact without so much as a moment's notice, over even the most trifling dispute with their employer.

We must bear in mind that the NLRB and the courts have applied the same legal standards to all health care facilities, without making necessary distinctions between the differing needs of hospitals, psychiatric wards or nursing homes. *See, e.g., Montefiore Hospital & Medical Center v. NLRB,* 621 F.2d 510 (2d Cir. 1980) (hospital); *NLRB v. Long Beach Youth Center, Inc.*, 591 F.2d 1276 (9th Cir. 1979) (psychiatric facility); *NLRB v. Rock Hill Convalescent Center, Inc.*, 585 F.2d 700 (9th Cir. 1978) (nursing home). Thus, the majority's decision sanctioning a "wildcat" strike in a nursing home creates a dangerous precedent for all health care facilities, including hospitals. Although the majority concedes the obvious—that the Act would not allow a nurse to walk out of an operating room in the middle of an operation—the majority's decision sanctioning a "wildcat" strike in a nursing home leaves the door open for future wildcat strikes in health care

facilities. Under the majority's holding today, would a nurse be permitted to abandon her duties in an emergency room, or would workers be entitled to walk off the job at a psychiatric institution, leaving mentally ill, and potentially dangerous patients, without care, supervision, medication or food?

II.

I would hold that the 17 employees violated section 8(g) of the Act (29 U.S.C. section 158(g)) in walking off the job without prior notification and thus the Rehabilitation Center management acted lawfully in discharging the employees. Section 8(g) provides that "a labor organization before engaging in any strike . . . at any health care institution shall, not less than ten days prior to such action notify the institution in writing." It is undisputed that the strikers in this case did not give the Rehabilitation Center ten days notice prior to walking off their jobs; in fact, they gave the Rehabilitation Center *no* notice whatsoever. Nevertheless, the majority holds that the walkout was protected since section 8(g) applies only to "labor organizations" and, in their view, the 17 employees were not a labor organization. In so holding, the majority has carved out a dangerous loophole for health care personnel including those working in hospitals, permitting them to walk off their jobs at the drop of a hat over minor disputes with their employer, thus leaving helpless patients without desperately needed care.

In the Act, Congress defined "labor organization" in very broad terms, section 2(5) of the Act (29 U.S.C. section 152(5)) states:

> "(5) The term 'labor organization' means *any* organization of *any* kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

(emphasis added).

Recognizing that the Act defines "labor organization" very broadly, the court in *NLRB v. Sweetwater Hosp. Ass'n,* 604 F.2d 454, 457 n.5 (6th Cir. 1979) construed the term "labor organization" as follows:

> " 'Labor organization' is broadly defined in the Act and requires only an 'organization' that 'exists for the purpose, in whole or in part, of dealing with employers' concerning specified matters. *See NLRB v. Cabot Carbon Co.,* 360 U.S. 203, 210-11, 79 S. Ct. 1015, 3 L. Ed.2d 1175 (1959). Indeed, the complete absence of by-laws or a formal structure is irrelevant."

Similarly, this court in *Pacemaker Corp. v. NLRB,* 260 F.2d 880, 883 (7th Cir. 1958) stated:

> "The fact that there was no formal organization, by-laws, officers or dues is immaterial in determining whether it is a labor organization. This Court has held that such loosely formed committees do constitute labor organizations within the meaning of the Act."

Based on the clear language of section 2(5) and this case law, it is evident that the definition of labor organizations consists of two elements: (1) "any organization of any kind"; and (2) a "purpose, in whole or in part, of dealing with employers concerning . . . hours of employment or conditions of work." The group comprised of the 17 employees who walked off their jobs satisfies both these elements. First, the 17 employees as of the time the walkout occurred, comprised an "organization" since they had already held two meetings, one in the hallways as soon as the lunch period notice was distributed and the other in the Center's lunch room, before reaching a collective decision to walk off their jobs. The group joined together for the common purpose of protesting the new lunch period policy, collectively decided to walk off the job, gathered as a group outside the facility and later acceded to the common decision to return to work. The fact that the organization of 17 employees was ad-hoc is irrelevant—"the complete absence of by-laws or a formal structure is irrelevant." *Sweetwater Hosp.,* 604 F.2d at

457. Furthermore, the second definitional requirement of "labor organization" is satisfied since the 17 employees clearly had "the purpose . . . of dealing with employers concerning . . . hours of employment, or conditions of work." The sole reason the employees banded together was to coerce their employer into abandoning its new lunch period policy, certainly a subject pertaining to hours of employment or a condition of work.

The cases cited by Judge Posner to support the conclusion that the 17 striking employees did not constitute a labor organization are inapposite to the facts of this case. For example, in *Montefiore Hospital & Medical Center v. NLRB,* 621 F.2d 510 (2d Cir. 1980), the court held that *two* doctors did not constitute a "labor organization." In support of its holding, the *Montefiore* court cited, without discussion, the case of *Kapiolani Hospital v. NLRB,* 581 F.2d 230 (9th Cir. 1978), which held that *one* individual employee did not comprise a "labor organization." Obviously, a lone employee cannot constitute an "organization" of any kind and it is similarly implausible to say that a group of only two employees constitutes a labor organization. However, the group of 17 employees in this case, who held two meetings prior to coming to a collective decision to walk out, is an entirely different matter. Admittedly, in *NLRB v. Long Beach Youth Center, Inc.,* 591 F.2d 1276 (9th Cir. 1979), the court held that a group of 17 employees who engaged in a work stoppage did not constitute a "labor organization" within the meaning of section 8(g). Although I believe the *Long Beach Youth Center* case was decided in error since it gave an unduly narrow reading to the definition of "labor organization," the *Long Beach Youth Center* case is readily distinguishable from the instant case since the *Long Beach Youth Center* the court specifically noted in its holding that the 17 employees did not hold an "organizational" meeting until *after* the walkout, while in this case the group held two meetings before collectively deciding to walk off the job.

In giving such an unduly narrow reading to the obviously broad definition of labor organization contained in section 2(5) of the Act, the majority has created a dangerous precedent for the future. Based on the majority's decision, health care employees may now abandon their jobs in nursing homes, hospitals, emergency rooms, psychiatric institutions or intensive or intermediate care units and leave helpless patients without care, without so much as a moment's notice, over almost any dispute with their employer. The majority reaches this conclusion despite the fact that in enacting section 8(g) of the Act, Congress recognized that

> "[i]t is in the public interest to insure the continuity of health care to the community and the care and well-being of patients by providing for a statutory advance notice of any anticipated strike or picketing. . . . The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care."

S. Rep. 93-766 (1974), H.R. Rep. 93-1051 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 3949. The majority's decision sanctioning wildcat strikes in the health care field will make it infinitely easier for unions to evade the 10-day advance notice requirement of section 8(g) by conducting so-called "wink and nod strikes"—a union could surreptitiously encourage a substantial number of its members to walk out, and then subsequently disavow any responsibility for the walkout. Under Judge Posner's view an employer in the health care field will be entirely without recourse in such a situation since both the union and striking employees, under the majority's reasoning, will be immune from discipline for their actions. More importantly, the majority's decision eviscerates and casts aside Congress' goal and specific intent in enacting section 8(g)'s 10-day notice provision—to prevent sudden interruptions in care to seriously ill patients.

III.

The majority's decision ignores one of the cardinal principles of labor law: once a union has been certified as the collective bargaining representative for a group of employees, those employees are barred from bargaining with their employer independently concerning wages, hours and other conditions of employment. Section 9(a) of the National Labor Relations Act (29 U.S.C. section 159(a) establishes that a duly certified union enjoys the exclusive right to represent the unionized employees in matters pertaining to collective bargaining:

> "(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect:. . . ."[1]

---

[1] It is clear that the June 15 unauthorized walkout is not protected by the proviso to section 9(a) allowing employees in a bargaining unit to independently present *grievances* to the employer. First, the dispute concerning the lunch period policy was not a "grievance," but rather a collective bargaining term since the lunch period policy "fix[ed] for the future the rules of the employment for everyone in the unit. . . ." *Hughes Tool Co. v. NLRB,* 147 F.2d 69, 72 (5th Cir. 1945). Second, the proviso to section 9(a) does not protect a walkout, certainly a form of economic coercion, since that provision cannot "be read to authorize resort to economic coercion." *Emporium Capwell Co. v. Western Addition Community Org.,* 420 U.S. 50, 61 n.12 (1975).

The importance of the exclusivity principle was recognized by the Supreme Court in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In *Emporium Capwell,* a group of unionized employees sought to bargain directly with their employer concerning alleged discrimination against black employees, even though the relevant collective bargaining agreement contained a clause prohibiting racial employment discrimination. Rather than pursuing the union grievance procedure established by the bargaining agreement, this group of employees by-passed the union, holding their own press conference denouncing their employer's "racist" policies and established a picket line outside the employer's premises. The employer discharged the participating employees and the National Labor Relations Board found that the employer had not committed an unfair labor practice in so doing. The Supreme Court agreed, citing a "background of long and consistent adherence to the principle of exclusive representation . . . ," *id.* at 65, and stated:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.*"

Id. at 63 (emphasis added), *quoting NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

In an earlier case, *Harnischfeger Corp. v. NLRB,* 207 F.2d 575 (7th Cir. 1953), this court applied the exclusivity principle to a fact situation similar to this case. In *Harnischfeger,* while the employer and the certified union were in the process of negotiations, a group of employees walked off their jobs "to put a little heat on the [employer] and see what they were going to

do." The Union had not authorized and, in fact, tried to prevent the walkout. The employer discharged some of the employees who had participated in the walkout, and this court upheld the employer's right to terminate the employees:

> "[W]e are of the opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purpose of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees. *The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace.*"
>
> * * *
>
> "When the union was selected by the employees and recognized by the company as bargaining agent, it was understood and agreed on all sides that bargaining with respect to wages, hours and conditions of work would be carried on between the union and the company in accordance with [section 7 of the Act], that the employees would acquiesce in action taken by the union and that they would not undertake independent action with respect to the matters they had committed to it as their authorized agency. Not only did the company agree to bargain with the union, *but the employees agreed to bargain only through the union.* Those who engaged in the 'wild cat' strike violated this agreement. * * *
>
> "*No surer way could be found to bring collective bargaining into general disrepute than to hold that 'wild cat' strikes are protected by the collective bargaining statute.*"

Id. at 579 (emphasis added), *quoting NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

Despite this clear case law, the majority seeks to justify the Board's decision in this case by distinguishing the holdings of *Emporium Capwell* and *Harnischfeger.* The majority argues

that the unauthorized walkout by the 17 employees was protected activity since it was a spontaneous protest in support of union objectives, stating that "if the Board chooses to distinguish between wildcat strikes that undermine the union's position as exclusive bargaining representative and ones that do not . . . *Sunbeam Lighting Co.*, 136 N.L.R.B. 1248, 1253-55 (1962) *enforcement denied*, 318 F.2d 661 (7th Cir. 1963); *R. C. Can Co.*, 140 N.L.R.B. 588, 595-96 (1963), *enforced*, 328 F.2d 974 (5th Cir. 1964), we must let it." I disagree with this excessive deference to the Board and Judge Posner's reliance on the theory set forth in the *R. C. Can* case since that theory (distinguishing between strikes which undermine the union's position and those which do not) has been thoroughly discredited and rejected by courts and legal commentators.

Prior to 1963, courts had universally held that all "wildcat" activity was *per se* unprotected. *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944); *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953); Gorman, Basic Text on Labor Law 307 (1976). In 1964, however, the Fifth Circuit in *NLRB v. R. C. Can Co.*, 328 F.2d 974 (5th Cir. 1964) departed from the well-settled "wildcat" principle and adopted a theory similar to the majority in this case. In *R. C. Can*, a small group of unionized employees engaged in an unauthorized "quickie strike" to pressure their employer into expediting on-going negotiations with the union. Like the majority in this case, the Fifth Circuit distinguished the long line of prior cases finding such activity unprotected, and held that an unauthorized "wildcat" strike is protected "if . . . it seeks to generate support for an acceptance of the demands put forth by the union . . . so long, of course, as the means used to not involve a disagreement with, repudiation or criticism of, a policy or decision previously taken by the union . . . ." 328 F.2d at 979.

The rationale of the *R. C. Can* decision and the majority in this case has been *repeatedly rejected* by the other circuits. For

example, in *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969) the Ninth Circuit held that an employer acted lawfully in discharging two employees for engaging in unauthorized picketing in an effort to force their employer to hire more minority employees. In so holding, the court stated:

> "We reject the rationale of *R. C. Can . . . . Draper* and our own decisions following *Draper* like *NLRB v. Sunset Minerals, Inc., supra*, seem more in accord with a concept of orderly bargaining premised upon democratic union processes. * * *
>
> "In sum, we conclude that [the two employees] had an obligation to go to the union with their desire for nondiscriminatory hiring. The record does not demonstrate that they approached the union, nor does it indicate that the union gave its sanction to their actions. Thus, while their concerted activity does fall within section 7, the operation of section 9(a) deprives it of the protection to which it would otherwise be entitled."

Id. at 221. Similarly, the Ninth Circuit in *Lee A Consaul Co., Inc. v. NLRB*, 469 F.2d 84 (9th Cir. 1972) reaffirmed its adherence to the principle that a "wildcat" strike is unprotected activity, holding that "we decline to follow *NLRB v. R. C. Can Co. . . .*" *Id.* at 85.

More recently, the Third Circuit in *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388 (3d Cir. 1974) held that a "protest 'demonstration,' " in the form of an unauthorized walkout and picket by a group of employees was unprotected by the Act, and therefore the employer acted lawfully in discharging the participating employees. In so holding, the court stated:

> "Nearly all of the circuits that have been confronted with this issue have followed the decision of the Fourth Circuit in *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944), *and have treated unauthorized strikes as unprotected activity per se. See Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960); *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953); *NLRB v. Illinois Bell Telephone Co.*,

189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951); *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969); *NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224 (9th Cir. 1954). This approach is supported by recent Supreme Court decisions holding that because of the interest of Section 9(a) of the Act in a union's status as exclusive bargaining agent, some of the Section 7 rights of the employees may be exercised only in accordance with the majority choice of the union. *See Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)."

Id. at 394 (emphasis added).

Even the Fifth Circuit, the court that originally adopted the reasoning followed by Judge Posner in this case, has severely questioned the continued validity of *R. C. Can.* In *NLRB v. Shop-Rite*, 430 F.2d 786 (5th Cir. 1970), the court held that an employer acted lawfully in discharging a group of employees for participating in an unauthorized "wildcat" strike. In so holding, the court first strictly limited the applicability of the *R. C. Can* holding:

> "*R. C. Can* concerned a very narrow set of circumstances in which the minority action was directed toward a specific, previously considered and articulated union objective. If union objectives are characterized in general terms—such as wages, job security, conditions of employment and the like—one can assume that in a great majority of instances minority action will be consistent with one or more of those objectives. *If R. C. Can is not applied with great care it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining.*"

Id. at 790 (emphasis added). The court went on to state:

> "We conclude that *R. C. Can* is of doubtful viability, and, in any event, its restricted factual framework does not reach the instant case. The challenge [to an employee's] discharge was not an established union objective. The union had been given no opportunity even to consider

> whether it should be an objective and, if an objective but not achieved, whether a strike would be employed as a weapon. *To the contrary the minority group, acting outside the channels of union affairs, took action first to protest, then to enlist what support they could for a walk out, and after the event notified the bargaining representative of the walk out and sought approval.*"

Id. at 791 (emphasis added).

One leading legal commentator has also concluded, based on this case law, that the legal theory relied upon by the majority is unsound and that "wildcat" strikes are unprotected activity *per se*:

> "When . . . employees have selected an exclusive representative to bargain with their employer, concerted activity on the part of a minority of employees, not formally authorized by the union, is commonly held unprotected."

Gorman, Basic Text on Labor Law 307 (1976). Furthermore, Professor Gorman interpreted the Supreme Court's *Emporium Capwell* decision as follows:

> "The Court also rejected the argument of the court of appeals—and thereby apparently the premise of the *R. C. Can* decision as well—that the dissidents could not have been working at cross-purposes with the union . . . .
>
> * * *
>
> "The Court's emphasis upon the principle of exclusive representation, and upon the need to channel the views of all factions within the unit through the majority union, reinforces the prevailing view since the early 1940's that wildcat concerted activities are unprotected and render the participants susceptible to discharge."

Id. at 311.

In addition to being contrary to the overwhelming weight of case law "treat[ing] unauthorized strikes as unprotected activity *per se*." *Food Fair Stores,* 491 F.2d at 394, the majority's holding that the Act protects a "spontaneous unorga-

nized walk out and protest" defies common sense, particularly since this case arises in the health care field where sudden interruptions in service can have disastrous consequences. First, Judge Posner fails to even suggest why an unauthorized strike deserves the protection of the Act merely because it is spontaneous rather than planned in advance. On the contrary, the fact that a walkout is spontaneous should render it *less* deserving of protection since spontaneity is inimical and repugnant to the Act's goal of encouraging the *orderly* resolution of employment disputes. If the 17 employees in this case had first presented their views to their duly elected union and allowed the union to discuss the matter with the employer, the whole problem may have been resolved in an orderly fashion, with no interruption in patient care. However, rash spontaneous behavior such as the unauthorized "wildcat" strike in this case prevented the orderly resolution of the employment dispute.

The majority further attempts to justify its holding by stating that the 17 employees merely meant to "protest" the adoption of the new lunch period policy, rather than to compel their employer to deal directly with the 17 employees instead of the union. The fallacy of this argument is obvious since persons certainly do not protest merely for the sake of protesting (or for getting fresh air and exercise). Rather, the very purpose of any protest is to persuade someone to adopt a desired course of action—in this case, the 17 employees sought to coerce their employer into abandoning its new lunch period policy. Thus, it is not surprising that courts have repeatedly held that "wildcat protest" strikes are unprotected activity. *See e.g., NLRB v. Shop-Rite Foods, Inc.*, 430 F.2d 786, 791 (5th Cir. 1971); *Food Fair Stores, Inc. v. NLRB*, F.2d 333 (3d Cir. 1974). The "wildcat" strike in this case was unprotected activity since "the minority group, acting outside the channels of union affairs, took action first to protest, then to enlist what support they could for a walkout, and after the event notified the bargaining representative of the walk-out and sought approval." *NLRB v. Shop-Rite Foods, Inc.*, 430 F.2d 786, 791 (5th Cir. 1970).

In conclusion, I would deny enforcement of the NLRB's order.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

259 NLRB No. 135 D—8424
East Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EAST CHICAGO REHABILITATION CENTER, INC.

and Case 13—CA—19196

RETAIL CLERKS UNION, LOCAL 1460, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL—CIO

DECISION AND ORDER

On June 16, 1981, Administrative Law Judge Peter F. Donnelly issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief to which the Respondent filed a brief in response. In turn, the General Counsel filed a motion to strike the Respondent's responding brief. Finally, the Respondent filed its exceptions in opposition to the General Counsel's motion to strike the Respondent's brief filed in response to the General Counsel's cross-exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The General Counsel's motion to strike the Respondent's responding brief is denied as lacking in merit.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

---

[2] The Respondent contends that the strike caused disruptions in patient care and the employees therefore sacrificed the protection of the Act. We disagree. The walkout involved fewer than half of the day-shift employees, with the remaining employees and supervisors working as scheduled. The strike lasted only 2 hours. Although some patient care schedules were not completely adhered to, there is no showing that the strike jeopardized any patient's safety or health. We find the employees did not lose the protections afforded health care employees under the Act. Further, once the strikers offered to return to work they could not be held responsible for any subsequent interruption in normal patient servicing. In particular, the strikers cannot be held accountable for the Respondent's refusal to take them back, nor for the cutback in physical therapy for 3 days. Anything that occurred after the employees offered to return was the Respondent's sole responsibility and is irrelevant to the strike.

In accordance with his partial dissent in *Olympic Medical Corporation,* 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth in that opinion.

[3] The Respondent requested an opportunity to argue its case orally before the Board. In our opinion the record, exceptions, and briefs adequately set forth the issues and positions of the parties. Accordingly, we deny the Respondent's request for oral argument.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, East Chicago Rehabilitation Center, Inc., East Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. January 8, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

D—8424

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make the below-named employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest, and WE WILL reinstate them:

Emma Baldwin
Betty Banks
Lillie Peard
Gail Bradford
Bula Clinton
Joyce Hathaway
Mary Hardy
Annie Pugh
Jurline Woods
Betty Reese
Terry Stewart
Cecelia Stone
Edward Veal, Sr.
Jeff Veal
Eloise White
Stella Williams
Eula Woods

EAST CHICAGO REHABILITATION CENTER, INC.

(Employer)

Dated---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

JD-295-81
East Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EAST CHICAGO REHABILITATION CENTER, INC.

and

Case No. 13-CA-19196

RETAIL CLERKS UNION, LOCAL 1460, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Judith Kuhn, Esq., of Chicago, IL, for the General Counsel.
Janet Goldberg, Esq., and *Paul J. Cherner, Esq.*, of Chicago, IL, for the Respondent.
Neal Rosenfeld, Esq., of Chicago, IL, for the Charging Party.

DECISION

Statement of the Case

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed on October 15, 1979 by Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, herein called Charging Party or Union. A complaint thereon was issued on April 24, 1980 alleging that East Chicago Rehabilitation Center, Inc., herein called Employer or Respondent violated Section 8(a)(1) of the Act by suspending and discharging 17 employ-

ees for engaging in an economic strike.[1] An answer thereto was timely filed by Respondent and pursuant to notice a hearing was held before the Administrative Law Judge at Chicago, Illinois on October 22, 23, December 8, 9, and 17 all in 1980. Briefs have been timely filed by General Counsel and Respondent which had been duly considered.

Findings of Fact

I.

Employer's Business

Employer is an Indiana corporation with a place of business located in East Chicago, Indiana where it is engaged in the business of providing extended nursing care. During the past calendar year, Respondent, during the course and conduct of its operations, derived gross revenues in excess of $100,000, and also purchased and received goods valued in excess of $5,000 directly from points outside the State of Indiana. The complaint alleges, the answer admits, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II.

Labor Organization

While the status of the Union as a labor organization is not specifically alleged, it is undisputed that the Union, the recently certified collective-bargaining representative of the employees; is acting in that capacity; and has negotiated a contract on behalf of the unit employees. Accordingly, I find that the Union is a labor organization with the meaning of Section 2(5) of the Act.

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[1] The complaint was amended at the hearing to allege the status of Metta Stone as a supervisor.

III.

The Alleged Unfair Labor Practices

A. Facts

The Employer is a 24-hour skilled nursing care facility employing about 100 employees and serving about 116 patients. After a National Labor Relations Board conducted election, the Union was certified on December 11, 1978 as the collective-bargaining representative for a unit of service and maintenance employees.

Thereafter a series of some 12 negotiating session took place in an effort to achieve a collective-bargaining agreement. The Union was represented at all of these bargaining sessions by Union business agents Wallace Evans and Arthur Primm. In addition, there was a three-member employee negotiating committee with two alternate members. Pursuant to an understanding with the business agents, the negotiating committee members did not participate directly in the negotiations, but communicated with the business agents who actually conducted the negotiations. While all of the negotiating committee members except Jurline Woods attended at least some of the negotiating sessions, none of them attended the last three sessions conducted on May 23, June 11 or June 18, 1979.[2] The Respondent was represented at all the negotiating sessions by Dr. Jerry Henderson, part owner of the facility and member, along with five others, of the facility's Board of Directors, and Steven Sanders, the administrator of the facility. Sanders however was not present at all times during all sessions due to other matters requiring his attention from time-to-time. During earlier sessions, a management consultant named Renee Stein participated on behalf of the Respondent. Beginning with the May 23 session, another consultant named Dominic Licata represented the Respondent.

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The Respondent sought a contract provision providing some overlap in shift hours in order to exchange information and smooth the transition between shifts. At the June 11 session, while discussing the shift lengthening proposal, other proposals were made by the Union, including certain proposals with a view towards extending the lunch period from 1-half hour to 1-hour, with two 15 minute breaks. During this discussion it appears that Licata learned for the first time that employees of the facility were being permitted to leave the premises during the 1-half hour paid lunch then in effect. Licata advised Henderson that the Respondent was liable under Workmen's Compensation regulations for accidents to employees during this lunch period even while off the Respondent's premises, because the 1-half hour lunch was paid time. Licata also told Henderson that something would have to be done about the problem. Upon being so advised Henderson, apparently accepting this advice as accurate, expressed the view to both Evans and Primm, that the practice would have to be stopped and that it was his intention to bring the matter to the attention of the Respondent's Board of Directors for resolution. The Union, for its part, conceded that the liability of the Respondent existed, but both Evans and Primm cautioned Henderson that any precipitous corrective action at this time would be unwise, particular since they were close to an agreement on a contract.[3]

As he had indicated at the June 11 session, Henderson did bring the matter to the attention of the Board of Directors on June 13. At this time, a decision was made to divest the facility

[3] Respondent contends that the evidence shows that the Union's representatives agreed to the elimination of the 1-half hour paid lunch on June 11, citing primarily the testimony of Henderson. However, my review of the testimony of all the participants at the June 11 session convinces me that Henderson's account of the June 11 session is confused and often contradictory, and I am persuaded that the Union did not agree to the elimination of the paid 1-half hour lunch period.

of the presumed liability by ending the practice of employees being permitted to leave the premises during the 1-half hour lunchbreak. Henderson then directed Sanders to prepare a memo to the employees so advising them. Sanders prepared the following memo dated Friday, June 15, 1979:

> May I take this opportunity to communicate and share with you one of the many concerns encountered by the Rehab.
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> The East Chicago Rehabilitation Center currently engages the services of over eighty employees, all of whom enjoy a list of benefits; the expenses of which, are borne primarily by the facility.
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> *Please Note:*
> Breaks and meal periods are fringe benefits paid solely and exclusively by our employers.
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> Because of this fact, the Rehab is liable and accountable for you under Workmen's Compensation during these periods.
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> It has been the PRACTICE of the Center to allow employees to leave the facility during meal periods and break periods.
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> This is both illadvisable and unfortunate.
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> If *any* employee is injured while out of the facility on company time (break, lunch, etc.) the employer is liable for that employee and may be subject to unnecessary legal action.
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> As you can see, this places Rehab on unsteady ground.
>
> In a serious attempt to avoid involvement in needless litigation, it will be needful to implement the following Policy:
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> Effective June 18, 1979 it will be NECESSARY and MANDATORY that all employees enjoy their lunch and break periods on the PREMISES of East Chicago Rehabilitation Center.

Failure to comply with this policy will result in Immediate Termination.

Please recognize, we are aware and mindful of your needs as an employee and are presently researching the possibility of a Food Service which will be accessible to all personnel during all shifts.

However, until then, may I present to you a list of restaurants that provide delivery service.

Barton's Pizzeria	Chez Toni's Pizza
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Also, remember our dietary service is available until 7:00 P.M. and bringing lunches from home as individuals or as a group has historically exemplified Americanism.

If you have any questions concerning this policy, please contact your immediate supervisor who is knowledgeable and capable of answering your questions.

The above memo was distributed to the employees at the facility, with their paychecks, beginning at about 7 a.m. on Friday, June 15.[4] Many of the employees were disturbed by the memo and feeling thus aggrieved, met with Metta Stone,

[4] It is undisputed that the Union was not advised or consulted concerning this decision.

nursing supervisor. Apparently not assuaged, some 10 to 20 employees thereafter went to the office of Sanders, who met with them at about 8:15 a.m. in the dining room, along with several other late arrivals for a total of between 30 to 40 employees. Sanders explained the matter of the facilities off premises lunch liability, but stated that he would try to have the change delayed. Still dissatisfied, a number of the employees punched out and left the premises, causing substantial disruption in the normal operations of the facility and creating serious patient care problems.

At about 10 a.m. Rebecca Brown, an employee, called Primm and told him that the employees were walking out. She told him about the paychecks and memo. Primm asked her to try and hold the people from walking out and to ask them to please wait until he got there. Brown told Primm that she was trying to stop them. Primm told her that he would be over right away and he arrived at about 10:15 a.m. Several employees outside the facility were asked by Primm to go inside with him. Once inside Primm met with Henderson and asked for permission to use the conference room to talk to the employees, and Henderson agreed.

The meeting took place attended by some 23 to 26 employees. Evans, having been contacted at Primm's request by the Union secretary, arrived about 10 minutes after the meeting began with some 3 or 4 more employees that Evans had met outside the facility and brought in with him. The employees complained about the memo and not being able to leave the premises for lunch. Primm explained the matter of the Respondent's liability and told them that the Union was attempting to work out the problem in contract negotiations. Both Evans and Primm explained that it was not proper to leave the facility and that there were federal laws which governed the matter. Evans and Primm told them that the Union did not condone or approve of the walkout and asked if they would be willing to go back to work. The employees

agreed to return to work at which point Evans and Primm went to seek out Henderson.

At about 10:30 a.m. they located Henderson and Sanders in Sanders' office. Evans told Henderson that the Union had not called the strike, did not condone the strike and did not agree with the strike. He expressed surprise that the lunch hour change had already been announced and that they had hoped that it would not have been done because it was going to make a contract hard to sell. Henderson said that the Board of Directors wanted to stop the practice and that the change had to be made. Evans told Henderson that the people were ready to return to work and that the Union would appreciate their being put back to work. Henderson responded that the situation was very serious and that he would have to consult with the Board of Directors in deciding what action to take as to the 17 employees who had participated in the walkout. Henderson told Evans that the employees were to go home for the day and that they were being suspended subject to a determination by the Board of Directors as to their terminations. The meeting ended and the employees left the premises. On the evening of June 15 Sanders sent mail-a-grams to the 17 striking employees advising them that there were being suspended indefinitely pending a review by the Board of Directors.

The Board of Directors met on Wednesday, June 20 and decided that discharge was the appropriate discipline for having engaged in the walkout and leaving patients unattended on June 15. On the same date, June 20, mail-a-grams from Sanders were sent to the employees advising them of their terminations, "for the reasons that on June 15, 1979 you walked off your job and left the building and otherwise abandoned your employment without just cause and in violation of applicable laws."

On June 18 the parties met in another negotiating session. The Union again solicitated Henderson to try to get the employees returned to work. This effort was not successful.

However, the parties were successful in reaching agreement on the terms of a contract which became effective on June 28, 1979. This contract included provisions for a 1-half hour unpaid lunch, two 20 minutes paid lunchbreaks, and a shift overlap of 30 minutes.

B. Discussion and Analysis

The facts of this case raise the basis issue of whether or not the employees who participated in the walkout on June 15 were engaged in protected concerted activity. The Respondent contends that they were not on various grounds. First, Respondent contends that the failure to give written notice, as required under the provisions of Section 8(g) of the Act,[5] had the effect of depriving the walkout of any status as protected activity that it might have otherwise enjoyed. I do not agree.

In reviewing the facts of the instant case, it is clear that the basic problem giving rise to the walkout i.e., the prohibition against employees leaving the premises during lunchtime, was not raised until the bargaining session of June 11 when it was raised by Licata.

At this session, the Union did not agree with the Respondent to any change in the Respondent's lunchtime practice which

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[5] Section 8(g) of the Act reads:

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

had permitted employees to leave the premises. All that the Union did was to express the view, in agreement with the Respondent, that the Respondent's liability existed.[6] It was the Respondent's Board of Directors who took the *unilateral* action of prohibiting employees from leaving the work premises during lunchtime.[7] As noted above, this was done by written notice with the paychecks of the employees on Friday, June 15, to become effective on Monday, June 18. This change was made without notice to the Union who had in fact cautioned against precipitous action being taken by the Respondent at the June 11 meeting.

Upon being notified on June 15 of the change, the employees became agitated and disgruntled. After receiving no satisfactory response in meetings with the Respondent, some 17 employees walked out in protest.

There is no evidence that the Union had any prior notice of the walkout. Clearly the Union was taken by surprise by the events of the morning of June 15. The Union was not aware that the strike had begun until it was so advised by an employee after the walkout had occurred. Thereafter, both Evans and Primm went to the Respondent's facility, met with the employees, told them that they were wrong in striking; that the Union did not condone the strike, and exacted from the employees agreement to return to work.

Thereafter, they met with Henderson and Sanders, told them that the Union did not condone the strike and asked Respondent to allow the striking employees to return to work. This request was rejected by the Respondent and employees were suspended and subsequently discharged.

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[6] Whether or not such liability actually existed, as a matter of law, was never established.

[7] For whatever reason, no 8(a)(5) violation was alleged as to this unilateral change, and no finding of a violation is made herein.

It is clear that the Union did all that it could after learning of the walkout to end it. Within about 2 hours, it had an agreement from the striking employees to return to work. Since the Respondent rejected this, any deleterious effect that the strike may have had thereafter was assignable to the Respondent, not the Union.

In these circumstances, it would not have been possible for the Union to have given the 8(g) notice contemplated by the Act since it had no prior notice of the walkout. Accordingly, I find that the Union's failure to provide such notice did not deprive the walkout of its protective character. Nor did the failure of the employees to provide 8(g) notice render the walkout unprotected. The notice requirements of Section 8(g) run to the Unions, not employees, and the failure of employees to give such notice prior to striking a health care institution does not deprive the strike of its normally protected character. *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977); *Montefiore Hospital and Medical Center*, 243 NLRB No. 106 (1979), enf'd 621 F. 2d 514; *Villa Care, Inc., d/b/a Edmonds Villa Care Center*, 249 NLRB 705.

However, Respondent also contends that the action of the employees in striking was in derogation of their collective-bargaining representative, and that therefore the striking employees are not entitled to the protection of the Act.

An examination of the facts herein discloses that after its certification on December 11, 1978, the Union and the Respondent engaged in negotiations for a first contract. On June 11, the matter of the Respondent's liability for employees leaving the premises on paid lunchtime was raised for the first time. No employees attended this negotiating session and there is nothing in the record to indicate that any of them were even aware that the subject was under discussion, and the Union did not agree to any change in the existing policy. Obviously, the Union and the employees were not taking inconsistent positions

on this issue, and it was in this posture that the matter was brought to the attention of the employees on Friday, June 15 when they were notified of the change in policy become effective on the following Monday.[8]

On these facts the Respondent's "derogation" argument cannot be sustained. First, the position taken by the Union at the June 11 negotiating session was not inconsistent with the position expressed by the employees by walking out. The Union and Respondent had not negotiated any agreement to end the practice.[9] It was a unilateral change undertaken by the Respondent, and it was essentially to protest this unilateral change that the employees took the strike action. Moreover, on a basis of this record, it does not appear that the employees who struck were even aware that the matter had been raised for discussion at the June 11 meeting. These facts do not describe any "derogation" theory so as to strip the employees of their status as economic strikers.

Nor, on the facts of this case can the walkout by the employees be construed as an effort on the part of the striking employees to seek separate bargaining with the Respondent despite the existence of their collective-bargaining representative. The walkout was simply a spontaneous reaction to the Respondent's unilateral action in changing a term of their employment, without prior notice or consultation with either the employees or their collective-bargaining representative. As noted earlier, the striking employees were not even aware that

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[8] While there may have been other matters causing discontent among the employees, which were expressed by them in meetings on June 15, it is clear that the Respondent's action which precipitated the walkout was the newly announced ban on leaving the premises at lunchtime.

[9] One could argue that since the Union conceded the Respondent's liability, it would have been sympathetic to any change in the practice, but this is speculation in which I am not disposed to indulge, and is not tantamount to agreeing to the change in practice.

the basic issue that they were protesting had even been raised in collective bargaining. Certainly such employee activity cannot be construed as an effort to seek separate bargaining. And so is obviously factually distinguished from the governing principle set forth in *Emporium Capwell Company* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

Respondent also makes the argument that, apart from notice requirements of Section 8(g), striking employees should not be entitled to the protection of the Act inasmuch as their actions resulted in patient neglect, and as a matter of public policy is repugnant to the Act. However, apart from the restrictions imposed upon Unions by the requirements of Section 8(g) of the Act, there is nothing in the Act which imposes greater restrictions on the activities of employees in the health care industry than employees of any other industry subject to the jurisdiction of the Act. *Montefiore Hospital and Medical Center, supra.*

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that the Respondent suspended and discharged employees for reasons which offended the provisions of Section 8(a)(1) of the Act. I shall therefore recommend that the Respondent make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided herein with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging employees for having engaged in protected concerted activity, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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[10] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[11]

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, East Chicago Rehabilitation Center, Inc., its officers, agents, successors, and assigns, shall:

1. cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former jobs to:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Beard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
Bula Clinton	Jeff Veal
Joyce Hathaway	Eloise White
Mary Hardy	Stella Williams
Annie Pugh	Eula Woods
	Jurline Woods

If those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings they may have suffered due to their suspension and discharge in the manner set forth in the section of this Decision entitled, "The Remedy."

(c) Preserve, and upon request make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports and all other records necessary to analyze the amounts of backpay due herein.

(d) Post at its facilities at East Chicago, Indiana, copies of the attached notice marked "Appendix."[13] Copies of the said notice on forms to be provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by them immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of receipt of this Decision what steps have been taken to comply herewith.

Dated, Washington, D.C. June 16, 1981

/s/ PETER E. DONNELLY
Peter E. Donnelly
Administrative Law Judge

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[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make the below-named employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest, and WE WILL reinstate them:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Peard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
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EAST CHICAGO REHABILITATION CENTER, INC.

(Employer)

Dated----------By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

JD-295-81
East Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EAST CHICAGO REHABILITATION CENTER, INC.

and

Case No. 13-CA-19196

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> If *any* employee is injured while out of the facility on company time (break, lunch, etc.) the employer is liable for that employee and may be subject to unnecessary legal action.
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> As you can see. this places Rehab on unsteady ground.
>
> In a serious attempt to avoid involvement in needless litigation, it will be needful to implement the following Policy:
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> > Effective June 18, 1979 it will be NECESSARY and MANDATORY that all employees enjoy their lunch and break periods on the PREMISES of East Chicago Rehabilitation Center.

Failure to comply with this policy will result in Immediate Termination.

Please recognize, we are aware and mindful of your needs as an employee and are presently researching the possibility of a Food Service which will be accessible to all personnel during all shifts.

However, until then, may I present to you a list of restaurants that provide delivery service.

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Ralph's Pizzeria	Iggy's
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Also, remember our dietary service is available until 7:00 P.M. and bringing lunches from home as individuals or as a group has historically exemplified Americanism.

If you have any questions concerning this policy, please contact your immediate supervisor who is knowledgeable and capable of answering your questions.

The above memo was distributed to the employees at the facility, with their paychecks, beginning at about 7 a.m. on Friday, June 15.[4] Many of the employees were disturbed by the memo and feeling thus aggrieved, met with Metta Stone,

[4] It is undisputed that the Union was not advised or consulted concerning this decision.

nursing supervisor. Apparently not assuaged, some 10 to 20 employees thereafter went to the office of Sanders, who met with them at about 8:15 a.m. in the dining room, along with several other late arrivals for a total of between 30 to 40 employees. Sanders explained the matter of the facilities off premises lunch liability, but stated that he would try to have the change delayed. Still dissatisfied, a number of the employees punched out and left the premises, causing substantial disruption in the normal operations of the facility and creating serious patient care problems.

At about 10 a.m. Rebecca Brown, an employee, called Primm and told him that the employees were walking out. She told him about the paychecks and memo. Primm asked her to try and hold the people from walking out and to ask them to please wait until he got there. Brown told Primm that she was trying to stop them. Primm told her that he would be over right away and he arrived at about 10:15 a.m. Several employees outside the facility were asked by Primm to go inside with him. Once inside Primm met with Henderson and asked for permission to use the conference room to talk to the employees, and Henderson agreed.

The meeting took place attended by some 23 to 26 employees. Evans, having been contacted at Primm's request by the Union secretary, arrived about 10 minutes after the meeting began with some 3 or 4 more employees that Evans had met outside the facility and brought in with him. The employees complained about the memo and not being able to leave the premises for lunch. Primm explained the matter of the Respondent's liability and told them that the Union was attempting to work out the problem in contract negotiations. Both Evans and Primm explained that it was not proper to leave the facility and that there were federal laws which governed the matter. Evans and Primm told them that the Union did not condone or approve of the walkout and asked if they would be willing to go back to work. The employees

agreed to return to work at which point Evans and Primm went to seek out Henderson.

At about 10:30 a.m. they located Henderson and Sanders in Sanders' office. Evans told Henderson that the Union had not called the strike, did not condone the strike and did not agree with the strike. He expressed surprise that the lunch hour change had already been announced and that they had hoped that it would not have been done because it was going to make a contract hard to sell. Henderson said that the Board of Directors wanted to stop the practice and that the change had to be made. Evans told Henderson that the people were ready to return to work and that the Union would appreciate their being put back to work. Henderson responded that the situation was very serious and that he would have to consult with the Board of Directors in deciding what action to take as to the 17 employees who had participated in the walkout. Henderson told Evans that the employees were to go home for the day and that they were being suspended subject to a determination by the Board of Directors as to their terminations. The meeting ended and the employees left the premises. On the evening of June 15 Sanders sent mail-a-grams to the 17 striking employees advising them that there were being suspended indefinitely pending a review by the Board of Directors.

The Board of Directors met on Wednesday, June 20 and decided that discharge was the appropriate discipline for having engaged in the walkout and leaving patients unattended on June 15. On the same date, June 20, mail-a-grams from Sanders were sent to the employees advising them of their terminations, "for the reasons that on June 15, 1979 you walked off your job and left the building and otherwise abandoned your employment without just cause and in violation of applicable laws."

On June 18 the parties met in another negotiating session. The Union again solicitated Henderson to try to get the employees returned to work. This effort was not successful.

However, the parties were successful in reaching agreement on the terms of a contract which became effective on June 28, 1979. This contract included provisions for a 1-half hour unpaid lunch, two 20 minutes paid lunchbreaks, and a shift overlap of 30 minutes.

B. Discussion and Analysis

The facts of this case raise the basis issue of whether or not the employees who participated in the walkout on June 15 were engaged in protected concerted activity. The Respondent contends that they were not on various grounds. First, Respondent contends that the failure to give written notice, as required under the provisions of Section 8(g) of the Act,[5] had the effect of depriving the walkout of any status as protected activity that it might have otherwise enjoyed. I do not agree.

In reviewing the facts of the instant case, it is clear that the basic problem giving rise to the walkout i.e., the prohibition against employees leaving the premises during lunchtime, was not raised until the bargaining session of June 11 when it was raised by Licata.

At this session, the Union did not agree with the Respondent to any change in the Respondent's lunchtime practice which

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[5] Section 8(g) of the Act reads:

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

had permitted employees to leave the premises. All that the Union did was to express the view, in agreement with the Respondent, that the Respondent's liability existed.[6] It was the Respondent's Board of Directors who took the *unilateral* action of prohibiting employees from leaving the work premises during lunchtime.[7] As noted above, this was done by written notice with the paychecks of the employees on Friday, June 15, to become effective on Monday, June 18. This change was made without notice to the Union who had in fact cautioned against precipitous action being taken by the Respondent at the June 11 meeting.

Upon being notified on June 15 of the change, the employees became agitated and disgruntled. After receiving no satisfactory response in meetings with the Respondent, some 17 employees walked out in protest.

There is no evidence that the Union had any prior notice of the walkout. Clearly the Union was taken by surprise by the events of the morning of June 15. The Union was not aware that the strike had begun until it was so advised by an employee after the walkout had occurred. Thereafter, both Evans and Primm went to the Respondent's facility, met with the employees, told them that they were wrong in striking; that the Union did not condone the strike, and exacted from the employees agreement to return to work.

Thereafter, they met with Henderson and Sanders, told them that the Union did not condone the strike and asked Respondent to allow the striking employees to return to work. This request was rejected by the Respondent and employees were suspended and subsequently discharged.

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[6] Whether or not such liability actually existed, as a matter of law, was never established.

[7] For whatever reason, no 8(a)(5) violation was alleged as to this unilateral change, and no finding of a violation is made herein.

It is clear that the Union did all that it could after learning of the walkout to end it. Within about 2 hours, it had an agreement from the striking employees to return to work. Since the Respondent rejected this, any deleterious effect that the strike may have had thereafter was assignable to the Respondent, not the Union.

In these circumstances, it would not have been possible for the Union to have given the 8(g) notice contemplated by the Act since it had no prior notice of the walkout. Accordingly, I find that the Union's failure to provide such notice did not deprive the walkout of its protective character. Nor did the failure of the employees to provide 8(g) notice render the walkout unprotected. The notice requirements of Section 8(g) run to the Unions, not employees, and the failure of employees to give such notice prior to striking a health care institution does not deprive the strike of its normally protected character. *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630 (1977); *Montefiore Hospital and Medical Center*, 243 NLRB No. 106 (1979), enf'd 621 F. 2d 514; *Villa Care, Inc., d/b/a Edmonds Villa Care Center*, 249 NLRB 705.

However, Respondent also contends that the action of the employees in striking was in derogation of their collective-bargaining representative, and that therefore the striking employees are not entitled to the protection of the Act.

An examination of the facts herein discloses that after its certification on December 11, 1978, the Union and the Respondent engaged in negotiations for a first contract. On June 11, the matter of the Respondent's liability for employees leaving the premises on paid lunchtime was raised for the first time. No employees attended this negotiating session and there is nothing in the record to indicate that any of them were even aware that the subject was under discussion, and the Union did not agree to any change in the existing policy. Obviously, the Union and the employees were not taking inconsistent positions

on this issue, and it was in this posture that the matter was brought to the attention of the employees on Friday, June 15 when they were notified of the change in policy become effective on the following Monday.[8]

On these facts the Respondent's "derogation" argument cannot be sustained. First, the position taken by the Union at the June 11 negotiating session was not inconsistent with the position expressed by the employees by walking out. The Union and Respondent had not negotiated any agreement to end the practice.[9] It was a unilateral change undertaken by the Respondent, and it was essentially to protest this unilateral change that the employees took the strike action. Moreover, on a basis of this record, it does not appear that the employees who struck were even aware that the matter had been raised for discussion at the June 11 meeting. These facts do not describe any "derogation" theory so as to strip the employees of their status as economic strikers.

Nor, on the facts of this case can the walkout by the employees be construed as an effort on the part of the striking employees to seek separate bargaining with the Respondent despite the existence of their collective-bargaining representative. The walkout was simply a spontaneous reaction to the Respondent's unilateral action in changing a term of their employment, without prior notice or consultation with either the employees or their collective-bargaining representative. As noted earlier, the striking employees were not even aware that

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[8] While there may have been other matters causing discontent among the employees, which were expressed by them in meetings on June 15, it is clear that the Respondent's action which precipitated the walkout was the newly announced ban on leaving the premises at lunchtime.

[9] One could argue that since the Union conceded the Respondent's liability, it would have been sympathetic to any change in the practice, but this is speculation in which I am not disposed to indulge, and is not tantamount to agreeing to the change in practice.

the basic issue that they were protesting had even been raised in collective bargaining. Certainly such employee activity cannot be construed as an effort to seek separate bargaining. And so is obviously factually distinguished from the governing principle set forth in *Emporium Capwell Company* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

Respondent also makes the argument that, apart from notice requirements of Section 8(g), striking employees should not be entitled to the protection of the Act inasmuch as their actions resulted in patient neglect, and as a matter of public policy is repugnant to the Act. However, apart from the restrictions imposed upon Unions by the requirements of Section 8(g) of the Act, there is nothing in the Act which imposes greater restrictions on the activities of employees in the health care industry than employees of any other industry subject to the jurisdiction of the Act. *Montefiore Hospital and Medical Center, supra.*

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that the Respondent suspended and discharged employees for reasons which offended the provisions of Section 8(a)(1) of the Act. I shall therefore recommend that the Respondent make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them. The backpay provided herein with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local 1460, Chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending and discharging employees for having engaged in protected concerted activity, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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[10] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[11]

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, East Chicago Rehabilitation Center, Inc., its officers, agents, successors, and assigns, shall:

1. cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to their former jobs to:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Beard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
Bula Clinton	Jeff Veal
Joyce Hathaway	Eloise White
Mary Hardy	Stella Williams
Annie Pugh	Eula Woods
	Jurline Woods

If those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings they may have suffered due to their suspension and discharge in the manner set forth in the section of this Decision entitled, "The Remedy."

(c) Preserve, and upon request make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports and all other records necessary to analyze the amounts of backpay due herein.

(d) Post at its facilities at East Chicago, Indiana, copies of the attached notice marked "Appendix."[13] Copies of the said notice on forms to be provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by them immediately upon receipt thereof and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of receipt of this Decision what steps have been taken to comply herewith.

Dated, Washington, D.C. June 16, 1981

/s/ PETER E. DONNELLY
Peter E. Donnelly
Administrative Law Judge

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[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discriminate against employees for engaging in a strike or other concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL make the below-named employees whole for any loss of pay they may have suffered as a result of the discrimination practiced against them, with interest, and WE WILL reinstate them:

Emma Baldwin	Betty Reese
Betty Banks	Terry Stewart
Lillie Peard	Cecelia Stone
Gail Bradford	Edward Veal, Sr.
Bula Clinton	Jeff Veal
Joyce Hathaway	Eloise White
Mary Hardy	Stella Williams
Annie Pugh	Eula Woods
Jurline Woods	

EAST CHICAGO REHABILITATION CENTER, INC.

(Employer)

Dated---------- By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7597.

Relevant Statutory Provisions

Section 2(5) of the Act [29 U.S.C. § 152(5)].

The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 7 of the Act [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

Section 8(a)(1) of the Act [29 U.S.C. § 158(a)(1)]

It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7; [29 U.S.C. § 157)]

Section 8(d) of the Act [29 U.S.C. § 158(d)]

. . . Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer . . .

Section 8(g) of the Act [29 U.S.C. § 158(g)]

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal

Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (3) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Section 9(a) of the Act [29 U.S.C. § 159(a)]

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.